STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
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FILE

November 6, 1992

VIA FEDERAL EXPRESS

92-100

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services
GEN Docket No. ~~90-314~~

Dear Ms. Searcy:

Please find enclosed for filing an original plus eleven copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine

Ellen S. LeVine
Attorney for California

ESL:nas

Enclosures (13)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

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MAIL BRANCH

In the Matter of	GEN Docket No. 90-314 ET Docket No. 92-100
Amendment of the Commission's Rules to Establish New Personal Communications Services	RM-7140, RM-7175, RM-7617, RM-7618, RM-7760, RM-7782, RM-7860, RM-7977, RM-7978, RM-7979, RM-7980 PP-35 through PP-40, PP-79 through PP-85

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California ("California") hereby submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("FCC") as referenced above. In these comments, California will address two issues: (1) spectrum allocation and eligibility for personal communications services ("PCS") licenses; and (2) the regulatory classification of PCS.

I. SPECTRUM ALLOCATION AND ELIGIBILITY FOR PCS LICENSES

California believes that the FCC should seek a dramatic increase in the competitive vitality of the public mobile communications market as a primary objective of its allocation

and assignment decisions in this proceeding. Specifically, California believes that the public interest demands a major increase of the number of fully-independent competitors in each geographic market.

At paragraph 36 of its NPRM, the FCC requests comment on the number of spectrum blocks and the size of each that should be allocated. Consistent with its interest in seeing a major increase in the number of competing providers, California supports a minimum of three license blocks.

At paragraphs 63-70, the FCC requests comments on whether cellular licensees should be allowed to acquire interests in PCS licenses. California strongly opposes the acquisition of any interests in PCS licenses by incumbent cellular licensees or affiliates. It is imperative that the FCC use this opportunity to intensify competition in the mobile market. Cross-ownership of cellular and PCS licenses will clearly compromise this effort.

Further, as the FCC notes at paragraph 66, cellular licensees are fully capable of deploying microcell PCS technologies to complement their existing cellular technologies within the existing 25 Mhz allocation they already enjoy. The NPRM provides no rationale which gives support to any belief that any scope economies between PCS and cellular technologies would be greater if cellular licensees receive 2 GHz spectrum than if such technologies were fully integrated within the same 900 Mhz "cellular spectrum".

At paragraphs 71-80, the FCC requests comments on whether local exchange carriers (LECs) should be allowed to acquire interests in PCS licenses. Two major concerns require California

to caution that the FCC consider carefully any support for LEC participation in PCS.

First and foremost, our belief that the FCC should seek a major increase of the number of fully-independent competitors extends to a concern that LEC-PCS affiliations not act to restrain "competition" between wire and wireless technologies. Because of the traditional concerns about potential conflicts among competitors which are affiliated with local exchange networks and those which are independent of such affiliations but require interconnection with local exchange networks to provide a viable service, the FCC should consider carefully whether to grant PCS licenses to LECs.

Further, consistent with the concern noted by the FCC at footnote 51 of the NPRM, a full range of competitive safeguards would need to be available to state as well as federal regulators. In addition, consistent with the FCC's proposal at paragraph 76, any authority for LECs to hold PCS licenses should be predicated on the absence of cellular holdings by that LEC or its affiliates.

II. REGULATORY CLASSIFICATION OF PCS

At paragraphs 94-98 of its NPRM, the FCC specifically requests comment on whether the FCC should preempt state regulation of PCS. The FCC proposes to preempt on either of two theories. Under the first, the FCC would classify PCS as private carriage, which, according to the FCC, would result in federal preemption of all state regulation of PCS. Specifically, the FCC would claim that PCS would qualify as a private land mobile

service under Section 332(c)(1) of the Communications Act, and thereby be free of any state regulation under the preemptive language of Section 332(c)(3). 47 U.S.C. §§332(c)(1) & (3).

Under the second theory, the FCC suggests that it may preempt state regulation of PCS even if it is classified as common carriage because (1) the intrastate component of PCS cannot be severed from the interstate component, and (2) state regulation of PCS will thwart or impede federal policies.

Federal preemption of state regulation of PCS offered on an intrastate basis is not warranted, whether PCS is classified as common or private carriage.

A. PCS May Not Lawfully Be Classified As Private

In National Ass'n of Regulatory Commissioners v. FCC, 525 F.2d 630, 644 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (NARUC I), the court made clear that the FCC does not have "unfettered discretion to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve." To the contrary, the "common law definition of common carriers is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities." Id.

In NARUC I, the court applied a functional test in determining whether to classify a service as common or private carriage. If providers of a service hold themselves out to serve the public indiscriminately, whether or not required by a regulatory agency, then that service should be classified as a common carrier service. Id. at 642-43. Accord, National Ass'n

of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II"). Moreover, in the field of communications, where the technology permits customers to transmit intelligence of their own design and choosing, the services provided over this technology will be deemed common carriage. NARUC II, 533 F.2d at 609, 610.

If, on the other hand, a carrier's "practice is to make individualized decisions in particular cases whether and on what terms to serve," then the service will be deemed private carriage. NARUC II, 533 F.2d at 608-9.

Based on the principles of NARUC I and NARUC II, the FCC is obliged to look at the particular functions performed by PCS in classifying that service.

In determining whether PCS is common or private carriage, it is important to distinguish the nature of the network from the nature of the services provided over that network. The personal communications network simply represents the next technological advance in the provision of basic communication services. Over time, the personal communications network will become as ubiquitous as the wireline and wireless networks in place today. And eventually, the personal communications network will become fully integrated with these existing networks.

As a result, communication services provided today over the wireline and wireless networks will eventually incorporate PCS wireless technology. The nature of these communication services as common carriage does not change simply because they may be technologically provided on a wireless instead of a wireline basis.

In this case, PCS "range[s] from wireless replacements for ordinary residential and office telephones to communication devices capable of sending and receiving voice and data to and from virtually anywhere." NPRM at ¶29. PCS therefore will likely be the functional equivalent of cellular and wireline telephone carriers, offering similar, if not identical, voice and data services. NPRM at ¶¶70-71.

Accordingly, basic services provided over a personal communications network would continue to be classified as common carriage. Enhanced services provided over this network would be classified for regulatory purposes in accordance with federal and state practice. California v. FCC, 905 F.2d 1217 (9th Cir. 1990). Dispatch-type services which meet the conditions of Section 332(c) of the Communications Act, 47 U.S.C. §332(c)(1), would be classified as a private land mobile service and not be subject to state authority. 47 U.S.C. §332(c)(3).

Regardless of their classification as private or common carriage, PCS can be jurisdictionally identified to permit dual regulation just as all other landline and wireless services are today. Nothing in the provision of PCS, as opposed to other wireless services, suggests otherwise.

Moreover, to the extent that states are operating within their assigned intrastate sphere with respect to PCS, the FCC may not properly intrude. Louisiana PSC v. FCC, 476 U.S. 355 (1986). This is so even if state regulation allegedly thwarts or impedes federal policies. Id.

B. Personal Communications Services Do Not Qualify as Private Land Mobile Radio Services Under Section 332(c) of the Communications Act.

At paragraph 96 of its NPRM, the FCC suggests that all services provided over a personal communications network could legitimately be classified as private land mobile service under 47 U.S.C. §332(c)(1) and hence, subject to federal preemption under 47 U.S.C. §332(c)(3). This suggestion is incorrect.

In enacting Section 332(c), Congress took care to distinguish between private and common carrier land mobile services. In Section 332(c)(1), Congress

> "(a) classifies the various types of shared radio systems currently licensed in the private land mobile services (e.g., specialized mobile radio and multiple licensed systems) as 'private' (i.e., non-common carrier) radio systems;
>
> (b) authorizes the entrepreneurs involved in such systems (i.e., licensees, equipment suppliers or any other third party) to offer their services or facilities to eligible users 'indiscriminately' or otherwise, as their discretion and marketplace forces may dictate; and
>
> (c) prohibits such shared systems from being interconnected with common carrier facilities if the licensees or entrepreneurs are engaging in the resale of telephone service or facilities."

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 54,55, reprinted in 1982 U.S. Code Cong. & Admin. News 2299.

Section 153(gg) further provides that a

> "private land mobile service" means a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations

> (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation."

47 U.S.C. §153(gg).

These provisions set up a three-part statutory test in order to qualify as a private land mobile service. First, one must determine whether the private system is licensed to multiple licensees or shared by a group of authorized users. Moreover, the land stations must be "regularly interacting" for communications by "eligible users" over "designated areas of operation." And, in Telocator Network of America v. FCC, 761 F.2d 763, 767 (D.C. Cir. 1985), the court made clear that Section 332(c)(1) applies "only to shared systems where the land station is controlled directly by the authorized users, and not to every shared system merely because the end-users have access to the system through the licensee."

If these conditions are met, then secondly, one must determine whether the mobile system is interconnected to the public switched network. If so, then thirdly, one must determine whether the entity providing the interconnection is reselling telephone exchange or interexchange service or facilities.

PCS does not appear to satisfy the first part of this test. Unlike dispatch-type services, PCS is not likely to share land stations among a "regularly interacting" group of eligible users. Instead, any individual, whether or not he or she interacts regularly with others, will use the service. Therefore, Section 332(c)(1) does not apply. The issues of whether PCS is

interconnected to the public switched network and entails the resale of basic telephone services or facilities are not reached.

The FCC nevertheless suggests here, and has similarly stated in other proceedings, that any mobile radio service may qualify as a private land mobile service under Section 332(c)(1) so long as the radio service does not include the resale of basic telephone services for profit. This interpretation of Section 332(c)(1) is overbroad and would eliminate the distinction between private land mobile radio services and all other radio services, whether common carrier or private. It would also eliminate any role for the states to play over radio services.

To be sure, in adding Section 332(c) to the Act, Congress sought to "provide a clear demarcation between private and common carrier land mobile services." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 54, reprinted in 1982 U.S. Code Cong. & Admin. News 2237, 2298. Moreover, Congress made no mention of any intent to alter the dual regulatory scheme over all carrier-provided wireless services. To the contrary, the legislative history indicates that Congress intended only to carve out a specific and narrow category of radio services--namely, dispatch-type services--as private land mobile services, and make only these services subject to exclusive federal authority.

Specifically, in describing typical private land mobile services, Congress pointed to services provided by "local government, police, fire, highway maintenance, forestry conservation, special emergency, power, petroleum, forest products, motion picture, relay press, special industrial, business, manufacturers, telephone maintenance, motor carrier,

railroad, taxicab, automobile emergency, and radiolocation." Id. at 2298. Congress also cited "specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems" and like systems as those which it intended to include in Section 332(c). And throughout the legislative history, Congress makes repeated references to "dispatch service."

Congress then stated that "in substance [Section 332(c)] deregulates dispatch service, except for 'grandfathered' common carrier stations..." Id. at 2299. In order to effectuate this deregulatory purpose, Congress made clear that, in this narrow circumstance, it intended to supersede the test for classifying dispatch-type services as common or private carriage as set forth in NARUC I. Id. Congress did not intend to obliterate the distinction between private and common carrier wireless services, and give the FCC jurisdiction over all of them.

In contrast, if the FCC's interpretation of Section 332(c) were correct (i.e., a radio service is private land mobile service simply if it does not resale switched telephone services for profit), then cellular services currently regulated as common carriage would qualify as a private land mobile carrier if the cellular provider simply resold switched telephone services at cost, and recouped its profit from other services provided. As a result, there likely be few if any public land mobile services

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remaining. And, no mobile radio services would be subject to state authority.[1]

In short, the FCC's interpretation of Section 332(c) would thwart the intent of Congress. It therefore should not be adopted.

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1. In 1954, Congress amended Sections 153(e), 152(b), and 221(b) of the Communications Act to make clear that point-to-point communication by radio between two points within a single State were subject to state, and not federal, authority. The legislative history of the section provides

> "Questions have been raised, however, with regard to the possibility that [telephone] companies [which are engaged primarily in intrastate activities and which therefore, should be subject to State and local regulation] might become subject to Federal regulation on account of the use by such companies of radio as a medium instead of wire lines. Under certain circumstances the use of radio is the best engineering solution as, for example, in the case of telephone service to moving vehicles or to isolated locations, such as farmhouses in rural communities or isolated business developments, such as mines, oil-drilling operations, seasonal resort areas, etc. The legislation is designed to make certain that the use of radio will not subject to Federal regulation companies engaged primarily in intrastate operations."

Sen. Rep. No. 1090, 83d Cong., 2d Sess. at 2 (1954).

CONCLUSION

California respectfully urges the FCC to maximize competition in the mobile service market in the manner discussed in Part I above and to classify PCS as common carriage subject to dual regulatory authority, as discussed in Part II.

Respectfully submitted,

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November 6, 1992

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 6th day of November, 1992, a true and correct copy of the document entitled COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA was mailed first class, postage prepaid to all known interested parties.

Ellen S. LeVine

Ellen S. LeVine

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